(1D)

No. 92-2058

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

HAWAIIAN AIRLINES, INC. and
PAUL J. FINAZZO, HOWARD E. OGDEN and
HATSUO HONMA,
Petitioners,

v.

GRANT T. NORRIS,
Respondent.

On Writ of Certiorari to the Supreme Court for the State of Hawaii

---

BRIEF FOR RESPONDENT

Of Counsel:
MARSHA S. BERZON
177 Post Street, Suite 300
San Francisco, CA 94108

MARK SCHNEIDER
9000 Machinists Place
Upper Marlboro, MD 20772

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006

EDWARD DELAPPE BOYLE
SUSAN OKI MOLLWAY *
CADES, SCHUTTE, FLEMING & WRIGHT
1000 Bishop Street, 10th Floor
Honolulu, Hawaii 96813
(808) 521-9200
Counsel for Respondent

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

57 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES — Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

A. *Facts.* Grant T. Norris was a licensed aircraft mechanic hired by Petitioner Hawaiian Airlines, Inc. ("HAL") on February 2, 1987. Joint Appendix ("Jt. App.") 21. Norris' license from the FAA authorized him to approve and return to service an aircraft after making, supervising, or inspecting certain repairs. Jt. App. 20-21. *See also* 14 C.F.R. §§ 65.85, 65.87. A mechanic approves an aircraft by signing the maintenance record. 14 C.F.R. § 43.9(a)(4). The mechanic may not approve for service any aircraft or part if the repair is not in accordance with the manufacturer's instructions or specifications or if the repair does not conform to the Federal Aviation Regulations ("FAR's"). 14 C.F.R. §§ 43.9, 43.13. If a mechanic makes a fraudulent or intentionally false entry in a record or report required by the FAR's, the FAA may suspend or revoke the mechanic's license or assess a fine. 49 U.S.C. §§ 1429, 1471; 14 C.F.R. § 43.12.

On a routine preflight inspection of one of HAL's DC-9 aircraft, Aircraft 70, in the early morning of July 15, 1987, Norris noticed that one of the main landing gear tires was worn. Jt. App. 21. The tire and bearing were removed, and Norris and the other mechanics present saw that the axle sleeve underneath, which normally has a mirror-smooth surface, was scarred and grooved, with gouges and burn marks clearly visible. Jt. App. 21.

Norris and other mechanics who saw the sleeve thought it was unsafe and needed to be changed. Jt. App. 22. However, their supervisor, Justin Culahara, ordered them to hand sand the sleeve and put a new bearing and tire over it. Jt. App. 22-23, 181-86. Culahara then ordered Norris to "sign off" on the maintenance record for installation of the tire. Jt. App. 23. A mechanic's signature on a maintenance record is a certification that a repair has been performed satisfactorily. 14 C.F.R. § 43.9 (a)(4). Norris refused to sign, saying that he had not

actually performed the tire installation. Jt. App. 23. Ultimately, the maintenance record, bearing identification numbers of mechanics other than Norris, pronounced that the tire assembly had been replaced and that the brakes were satisfactory. Record in Civil No. 87-3894-12 ("R"), vol. 17 (Deposition of Justice Culahara, vol. 1, June 28, 1989, at 120-25 and Exhibit 6).

Culahara suspended Norris on the spot, pending a termination hearing. Jt. App. 23. Aircraft 70 carried passengers on numerous flights with the damaged axle sleeve in place. Jt. App. 120-22.

On July 15, 1987, Norris contacted the FAA to say that there was a problem with the HAL aircraft that he had serviced. Jt. App. 23. Norris then met with a Norman Matsuzaki, Culahara's superior, to tell him what had happened. Norris mentioned his contact with the FAA. Matsuzaki chased Norris from his office, assuring Norris that Norris was "gone." Jt. App. 24.

Norris invoked the grievance procedure outlined in the collective bargaining agreement between the International Association of Machinists and HAL. Jt. App. 96. The agreement stated that an aircraft mechanic "may be required to sign work records in connection with the work he performs." The agreement also required suspensions or discharges to be "justified." Appendix F at 49a, 53a-54a of Appendix to the Petition for a Writ of Certiorari ("Pet. App."). Norris' termination hearing was held on July 31, 1987. Matsuzaki presided over the hearing and terminated Norris for "insubordination."[1] Jt. App. 97-99. Before the next step of the grievance process, HAL's Vice President of Maintenance and Engineering, Howard E. Ogden, offered to "mitigate" Norris' punishment to suspension without pay. Ogden explicitly warned that "any further instance of failure to perform your duties in

[1] Petitioners' brief suggests that, rather than being "terminated," Norris was only "recommended" for termination. Brief for Petitioners ("Pet. Brief") at 34, 43. Yet, Norris was given a document that stated, "Mr. Grant Norris *terminated* as of this day, August 3, 1987, for insubordination." Jt. App. 214 (emphasis added).

a responsible manner" could be punished by discharge. HAL wrote to Norris' union representative and stated that HAL's action "negates the need" for any further hearing. Jt. App. 100-01, 207-12, 261-19. Norris refused to accept the reinstatement offer under the circumstances. He filed suit against HAL in state court on December 8, 1987. Jt. App. 3-11.

As a result of information provided by Norris, the FAA seized the axle sleeve on August 4, 1987, and began a comprehensive investigation of the matter. Jt. App. 120-31. *See also* R., vol. 17 (Deposition of Richard S. Teixeira, Records of Federal Aviation Administation, Dec. 6, 1989). On March 2, 1988, the FAA proposed a civil penalty of $964,000.00 against HAL on the basis of 958 flights Aircraft 70 had made with the damaged sleeve. Jt. App. 120-22. The FAA inspector who seized the sleeve found it to be damaged beyond allowable repair limits. Jt. App. 121-22. The FAA proposed to revoke the FAA license of Culahara, the supervisor who had suspended Norris. Jt. App. 125-28.

In September 1987, the FAA notified HAL that it intended to inspect the axle sleeves of two other aircraft in HAL's fleet. Before the inspection could take place, however, HAL replaced the sleeves on those aircraft. The FAA demanded that the sleeves that had been removed be turned over, but HAL said that it had "misplaced" or "lost" at least six of the eight replaced sleeves.[2]

B. *Proceedings.* Norris' suit against HAL alleges that his discharge violated public policies articulated in the Federal Aviation Act and the FAR's. Jt. App. 3-7. Count I of the Complaint was based on *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625 (Haw. 1982), which held that it was against the public policy of Hawaii for an employer to fire an employee for reporting violations of law. HAL

[2] The FAA issued a report finding evidence that HAL employees had intentionally "lost" the sleeves. Jt. App. 62, 64 n.37. Eventually, HAL settled all pending FAA charges for a substantial fine. Jt. App. 292-94.

removed the entire case to federal district court (R., vol. 1, at 48-91), where the question of whether federal labor law preempted the case was litigated. The federal court remanded the public policy discharge claim, among others. Jt. App. 331-45. HAL moved for reconsideration, which the federal district court denied, citing *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988). Jt. App. 346-67.

In state court, HAL moved to dismiss Norris' claims on the ground that the state court lacked subject matter jurisdiction. R., vol. 5, at 1-136. The state trial court granted that motion as to Count 1 but not as to other counts, then certified its order as final under Haw. R. Civ. P. 54(b), leaving for trial Norris' other claims. R., vol. 29, at 105-08. Norris appealed from the judgment dismissing Count I against HAL and also from rulings in favor of Paul J. Finazzo, Howard E. Ogden, and Hatsuo Honma, (R., vol. 29, at 117-26), who were defendants in Civil No. 89-2904-09, with which Norris' case against HAL had been consolidated. R., vol. 18, at 407-08. The rulings in favor of the three individuals had dismissed Counts I and II, both of which alleged violations of public policy.[3]

The Hawaii Supreme Court reversed the state trial court's judgment in *Norris v. Finazzo* and in *Norris v. HAL*. *See* 824 P.2d 634 (1992), and Pet. App. B & C. This Court granted the certiorari petition filed by HAL and the individual defendants.[4]

---

[3] Count II of the Complaint against HAL alleged statutory violations of the Hawaii Whistleblowers' Protection Act, Haw. Rev. Stat. §§ 378-61 to 378-69. Jt. App. 7-8. Count II of the Complaint against the individual defendants, by contrast, stated a common law claim based on an alleged violation of the public policy evidenced in the Hawaii Whistleblowers' Protection Act. The statutory claim asserted against HAL has never been part of any appeal; no appealable ruling on that claim ever issued. R., vol. 6, at 317-18; vol. 29, at 1-3.

[4] HAL has gone into bankruptcy; the parties have stipulated in the bankruptcy court to the processing of the present appeal. Meanwhile, Finazzo and Honma were recently granted summary judgment by the state court on claims not before this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question in this case is whether an airline employee is precluded by the Railway Labor Act ("RLA") from seeking relief under a state law common law cause of action for retaliatory discharge.

I. As we show in Part I, *infra*, the suggestion that Congress, in enacting the RLA, intended substantively to displace state law minimum employment standards is not only insupportable on the most basic of preemption principles but is flatly contrary to a long line of cases in this Court. From *Missouri Pacific Railroad Co. v. Norwood*, 283 U.S. 249 (1931), to *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557 (1987), this Court has consistently maintained that the RLA does not speak at all to substantive employee protections, and does not displace public law principles providing such protections to employees.

II. Petitioners alternately argue that Congress, in the RLA's "minor dispute" provisions, directed that all employment-related disputes, including those governed by law external to collective bargaining agreement, be submitted to RLA adjustment boards. As we show in Part II, *infra*, the requisite evidence of such an intent is sorely lacking. None of the cases rejecting substantive preemption so much as hints that the surviving claims should be resolved by adjustment boards. The language of the RLA does not, as petitioners maintain, indicate, through the use of the term "grievance," that noncontractual causes of action, were intended to be submitted to RLA adjustment boards. This reading of the statute is confirmed, moreover, by the legislative history of the RLA. And the agency designated by Congress to administer the RLA dispute resolution mechanism, the National Railroad Adjustment Board, has over the years repeatedly stated its understanding that its jurisdiction extends only to contract-based claims. Further, any doubts regarding the

RLA's meaning must be resolved against petitioners' version, since that construction would create serious constitutional issues under the Seventh Amendment.

Petitioners maintain, however, that in *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. 711 (1945), this Court has concluded otherwise. *Burley* does indeed contain some language, albeit in *dicta*, that can be read to suggest that adjustment boards have jurisdiction to consider noncontract-based issues. But the meaning of that *dicta* is not clear, and has never been followed in any case of this Court. And *Burley* was premised upon the assumption, overruled by this Court in a line of cases culminating in *Andrews* v. *Louisville & Nashville R.R. Co.*, 406 U.S. 320 (1972), that use of the RLA minor dispute resolution mechanism is discretionary, not mandatory; thus, the *dicta* in *Burley*, in context, does not support any preemptive conclusion. Moreover, the line of cases culminating in *Andrews* makes clear that the RLA dispute resolution mechanisms are exclusive only with respect to *contract-based* claims.

III. Petitioners also suggest that, even if their broad submission is incorrect, there is some basis for RLA preemption of a case that is not contract-dependent, if a parallel case could have been brought, on the same facts, under the collective bargaining agreement and its grievance procedures. This is not the rule under the NLRA; *Lingle, supra*, makes clear that § 301 of the Labor- Management Relations Act, ("LMRA") does not displace state causes of action that simply parallel contractual causes of action but do not depend on the agreement for resolution. As we show in Part III, *infra*, there is no basis for any other rule under the RLA. Because Norris' causes of action are not contract-dependent, the judgment below should be upheld.

ARGUMENT

I. THE RAILWAY LABOR ACT DOES NOT DISPLACE STATE LEGAL RULES PROVIDING SUBSTANTIVE PROTECTION FOR EMPLOYEES.

The question presented in this case is whether the Hawaii Supreme Court erred in concluding that its state law of retaliatory discharge is *not* preempted by the Railway Labor Act ("RLA"). Petitioners' essential submission is that the state law *is* preempted. According to petitioners the RLA precludes states from applying their statutory or common law minimum labor standards to employees subject to an RLA collective bargaining agreement, and from providing for state court jurisdiction over a suit by an RLA-covered employee who brings *any* employment-related claim—including a claim under such state law. This is so, petitioners assert, even if the state law claim asserted does not rest in any way on the governing labor agreement. *See, e.g.*, Pet. Br. at 14-15.[5]

Petitioners' argument is grounded on a profound misunderstanding of the RLA's language and purpose, and of this Court's RLA jurisprudence. The RLA is concerned in its entirety with the formation and the functioning of collective bargaining relationships in the railroad and airline industries. The statute contains provisions governing the selection of collective bargaining representatives (45 U.S.C. § 152, Third & Ninth); protecting union organizing and independence (§ 152, Fourth & Fifth); and, most prominently, regulating the process of collective bargaining and the settlement of disputes concerning bargaining and the resulting collective agreement. (§§ 152, Sixth & Seventh, §§ 155, 156, 157, 158, 159, 160). In the last regard, the RLA requires that "disputes growing out of grievances or out of the interpreta-

[5] Thus petitioners maintain that "the RLA scheme supports preemption of state 'wrongful discharge claims,' " not just adjudication of those claims by RLA adjustment boards. And they so maintain ". . . even if that means that state law rights and remedies will be lost." Pet. Br. at 30. *See also id.* at 34.

tion or application of agreements covering rates of pay rules, or working conditions" (commonly called "minor disputes"),[6] be resolved: through conferences between the carrier and the "representative or representatives . . . of [the] employees," § 152, Sixth; *see also* § 153, First (i); § 184; and if that method fails, by an adjustment board composed of representatives of the carriers and unions, § 153, First (i), Second; § 184.[7]

Nothing in the RLA treats with, much less determines, the substantive rules that will govern matters such as employee safety, recompense for workplace injuries, employment discrimination and harassment, minimum wages and their payment or—most pertinent to this case—recourse against retaliatory discharges (other than discharges in retaliation for exercise of those rights created by the RLA itself, *see* § 152, Third).

While as a general proposition all these matters are governed by statutory and common law minimum labor standards norms, petitioners claim that in enacting the RLA over sixty years ago, Congress displaced all such individual employee legal protections for rail and airline employees covered by collective bargaining agreements.

A. Even as an initial proposition, petitioners' sweeping preemption argument necessarily fails the most basic governing standards. Federalism principles counsel that, in preemption cases generally, " 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the

[6] *See, e.g., Consolidated Rail Corp. v. Railway Labor Executives Ass'n ("Conrail")*, 491 U.S. 299, 301-04 (1989).

[7] There is a difference, not here material, between the railroad and airline industries. Railroad disputes are ordinarily directed by the union and employer to the National Railroad Adjustment Board created by the statute (although alternative adjustment boards are allowed). Since no such national board has ever been created for the airlines, separate system adjustment boards created by the airlines and the unions through collective bargaining resolve airline disputes. *See* 45 U.S.C. §§ 153, 184; *see also Conrail*, 491 U.S. at 301-04.

clear and manifest purpose of Congress.' " *Hillsborough County Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). As the Court said in *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 500 (1988), "to say that [pervasive preemption] can be created is not to say it can be created subtly."

Congress has never made "clear and manifest" any intention to preempt state minimum labor standards laws generally, or, state wrongful discharge laws in particular. Nothing in the "plain language" of the RLA restricts states from acting affirmatively to protect employees in the industries covered by the statute. The RLA is quite distinct from federal *substantive* labor standards laws in this particular.[8] And, while petitioners point repeatedly to portions of the RLA legislative history that, in their view, indicate that Congress was concerned about uniformity in the regulation of the airlines and railroads, such generalized concerns, standing alone, are not sufficient to provide the requisite clear indication of preemptive intent:

> While we have frequently said that pre-emption analysis requires ascertaining congressional intent, *see, e.g., Louisiana Public Service Comm'n*, [476 U.S. 355, 369 (1986)] we have never meant that to signify congressional intent in a vacuum, unrelated to the giving of meaning to an enacted statutory text. There is no text here . . . that might plausibly be thought to imply exclusivity—to which expressions of pre-emptive intent in legislative history might at-

[8] *See, e.g.*, 29 U.S.C. § 1144(a) (Employment Retirement Income Security Act preemption); 29 U.S.C. § 667 (Occupational Safety & Health Act preemption); 45 U.S.C. § 484 (Federal Rail Safety Act preemption).

We note that such federal minimum employment standards statutes may, in fact, preempt some state causes of action for retaliatory discharge. *See, e.g., Ingersoll-Rand Corp. v. McClendon*, 111 S.Ct. 478 (1990).

> tach. . . . [U]nenacted approvals, beliefs, and desires are not laws. Without a text that can, in light of those statements, plausibly be interpreted as *prescribing* federal pre-emption it is impossible to find [preemption of state employee-protective rights]. [*Puerto Rico Dept. of Consumer Affairs*, 485 U.S. at 501 (emphasis in original).]

See also CSX Transportation, Inc. v. Easterwood, 113 S. Ct. 1732, 1737 (1993); *Cipollone v. Liggett Group, Inc.*, 112 S. Ct., 2608, 2618 (1992); *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476, 2481-83 (1991).

Nor is there any possible argument that Congress, in enacting the RLA, has "so thoroughly occupie[d the] legislative field" of employee protective rules in the railroad and airline industries " 'as to make reasonable the inference that Congress left no room for the States to supplant it.' " *Cipollone*, 112 S. Ct. at 2617 (quoting *Fidelity Federal Savings & Loan v. De la Cuesta*, 458 U.S. 141, 153 (1982)). To the contrary, while the RLA regulation of the formation and the functioning of the collective bargaining system is pervasive—and the RLA is therefore broadly preemptive with regard to matters concerning union organization, collective bargaining, and the parties use of economic weapons[9]—the RLA does not, as we stated at the outset, address the subject of individual employee protections at all.

B. Putting that threshold point to the side, the particular preemption question here—whether or not the RLA displaces all state employee protective causes of action—is not new to this Court. To the contrary, by the time this Court, in *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985), unanimously *rejected* the argument that the National Labor Relations Act ("NLRA") scheme of free collective bargaining preempts all state minimum labor standard laws, the Court's

---

[9] *See, e.g., Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969).

decisions had already repeatedly rejected that same argument in the RLA context.

Metropolitan Life ruled that the federal scheme of collective bargaining is by design interstitial and meant to supplement rather than to displace state and federal minimum labor standard protection laws. The collective bargaining laws, said the Court, were "developed . . . within the larger body of state law promoting public health and safety." 471 U.S. at 756. "[N]o incompatibility exists, therefore, between federal rules designed to [protect collective bargaining] and state or federal legislation that imposes minimal substantive requirements on contract terms." *Id.* at 754; *see also Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987).

The *Metropolitan Life* Court recognized that its conclusion on the interplay between the NLRA and state minimum labor standard laws applied and reaffirmed the identical conclusion previously reached in the RLA setting. 471 U.S. at 757, n. 32. The first of these cases was *Missouri Pacific Railroad Co. v. Norwood*, 283 U.S. 249 (1931). There, one of the employer's arguments against application of a state law regulating the number of employees required to operate certain railroad equipment was that, by enacting the RLA, Congress created a federal forum to resolve "disputes between a carrier and its employees arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, *rules or working conditions*." *Norwood*, Appellant's Brief at 73 (quoting the RLA, emphasis in original). The railroad argued that Congress' decision to have a federally created and sanctioned board resolve such disputes necessarily deprived the states of any authority to enact or enforce any legal rules whatsoever governing the railroad employment relationship. *Id.* at 74-76. The Court determined that this argument—similar in form to the argument made by petitioners here—merited the following response: "No analysis or discussion of the provisions of the Railway Labor Act of 1926 is necessary to show that it does not conflict with the Arkansas stat-

utes under consideration." 283 U.S. at 258. *See also Brotherhood of Locomotive Engineers v. Chicago, R. I. & P. R. Co.*, 382 U.S. 423 (1966).

The next case in this line is on all fours with the case currently before the Court. In *Terminal Railroad Association of St. Louis v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943), rail employees covered by the RLA eschewed remedies available through the RLA National Railroad Adjustment Board ("NRAB") and, instead, brought a claim before the Illinois Commerce Commission challenging their employer's failure to provide cabooses on all of its trains operating within the state. The Commission ordered the railroad to provide the cabooses, and the State Supreme Court affirmed the order. *Id.* at 3.

Before this Court, the railroad argued that the governing labor agreement required cabooses only on some of the trains, and that the dispute should have been resolved by the NRAB. The Court framed the issue presented, and resolved that issue, as follows:

> We assume, without deciding, that the demand for additional caboose service and its refusal constitute a dispute about working conditions, and that the National Railroad Adjustment Board would have jurisdiction of it on petition of the employees or their representative and might have made an award such as the order in question or some modification of it. The question is whether the Railway Labor Act, so interpreted, occupied the field to the exclusion of the state action under review. We conclude that it does not. . . . [318 U.S. at 6.]

In reaching its conclusion, the Court recognized that railroad operations are inevitably interstate in nature, and that, in the absence of yard facilities at the state border, the result of its decision would be that the railroad would have to operate cabooses even outside of the state's boundary. 318 U.S. at 8. But the Court nevertheless concluded as follows:

> The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. . . .
>
> State laws have long regulated a great variety of conditions in transportation and industry, such as sanitary facilities and conditions, safety devices and protections, purity of water supply, fire protection, and innumerable others. Any of these matters might, we suppose, be the subject of a demand by workmen for better protection and upon refusal might be the subject of a labor dispute which would have such effect on interstate commerce that federal agencies might be invoked to deal with some phase of it. But we would hardly be expected to hold that the price of the federal effort to protect the peace and continuity of commerce has been to strike down state sanitary codes, health regulations, factory inspections, and safety provisions for industry and transportation. . . . . [I]t cannot be that the minimum requirements laid down by state authority are all set aside. We hold that the enactment by Congress of the Railway Labor Act was not a preemption of the field of regulating working conditions themselves. . . . [318 U.S. at 6-7 (citation omitted).][10]

---

[10] *Terminal Railroad* was decided prior to this Court's decision in *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972), making clear that adjustment board jurisdiction over minor disputes is exclusive. *See infra* pp. 37-39. As the quotation in text makes clear, however, and as the reliance on *Terminal Railroad* in *Metropolitan Life* confirms, *Terminal Railroad*'s holding did not at all depend upon an understanding that the Board and the courts had concurrent jurisdiction over minor disputes.

We submit that *Norwood, Terminal Railroad* and *Metropolitan Life* require rejection of petitioners' RLA preemption argument and are thus dispositive here. It is telling in this regard that petitioners fail entirely to do business with these precedents.

C. Notwithstanding the foregoing, we would be derelict if we did not add that the Court has recently rejected the argument for RLA substantive supremacy over a *federal* labor standards statute. In *Atchison, Topeka and Santa Fe R. Co. v. Buell*, 480 U.S. 557 (1987), the employer argued that the RLA precluded the resolution through a court trial of an employee's personal injury claim brought under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 151-60. Because the dispute between the employer and employee in question could have been resolved by the relevant adjustment board as "a labor grievance under the RLA," *id.* at 559, said the employer, "an FELA action for damages is barred," *id.* at 564. The employee, on the other hand, argued that nothing in the RLA limited railroad employees' FELA rights.

The *Buell* Court rejected the employer's RLA supremacy argument, reiterating the consistent conclusion of *Norwood, Terminal Railroad* and *Metropolitan Life* that rights that derive from sources other than a labor agreement are in no way compromised by the RLA:

> The fact that an injury otherwise compensable under the FELA was caused by conduct that may have been subject to arbitration under the RLA does not deprive an employee of his opportunity to bring an FELA action for damages. . . . The FELA not only provides railroad workers with substantive protection against negligent conduct that is independent of the employer's obligations under its collective-bargaining agreement, but also affords injured workers a remedy suited to their needs, unlike the limited relief that seems to be available through the Adjustment Board. It is inconceivable that Congress intended that a worker who suffered a disabling injury would be

> denied recovery under the FELA simply because he might also be able to process a narrow labor grievance under the RLA to a successful conclusion. [480 U.S. at 564-65.]

Since, as this Court has held in *Metropolitan Life*, there is "no reason to believe that for this purpose Congress intended state minimum labor standards to be treated differently from minimum federal standards," 471 U.S. at 755, *Buell* provides still further support for the proposition that the RLA does not operate to strip railroad and airline employees covered by an RLA collective bargaining agreement of rights otherwise available to employees generally.

II. THE RLA DOES NOT REQUIRE THAT EXTRACONTRACTUAL CAUSES OF ACTION BE HEARD BY ADJUSTMENT BOARDS.

In a variation on the theme that the RLA substantively preempts state labor standards laws, petitioners argue that even if the RLA does not eliminate a railroad or airline employee's state labor standards laws cause of action, the RLA does have a preemptive force that relegates all such cases to arbitration within the RLA minor dispute resolution system.[11] Given petitioners' emphasis on this "jurisdictional" preemption claim, we consider the point in detail. So that we are not misunderstood, however, we state at the outset that the preemption arguments rejected in *Terminal Railroad* and *Buell* were in fact premised on a similar theory and that those precedents govern this phase of the instant case and require rejection of petitioners' position.

A. It facilitates analysis to have firmly in mind the adjudicatory system to which, petitioners would have it,

---

[11] Ae we point out later, however, the NRAB and the airlines system boards of adjustment have always refused to hear issues based upon law external to the contract. *See* pp. 30-32, *infra*. Therefore, petitioners' apparently jurisdictional argument will have the actual substantive effect of stripping RLA employees of their noncontractual rights, contrary to this Court's cases just discussed.

the RLA allocates the determination of all common law and statutory employment-related causes of action.

> As the [National Railroad Adjustment] Board has operated in practice, the procedures followed in holding hearings have been quite informal and have differed from the trial-type hearings conducted by other agencies. . . Disputes are referred to the Adjustment Board by the filing of written submissions. . . . It would be most extraordinary for live testimony to be given by witnesses. There is no requirement that a factual submission or other written statement be sworn. There is no cross-examination of witnesses and no record of the transcript of proceedings. There is no provision for issuance of subpoenas or compulsory attendance of witnesses. [Hearings on H.R. 706 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 89th Cong., 2d Sess., 49 (1966), *reprinted in* IV *The Railway Act of 1926: A Legislative History* (Michael H. Campbell & Edward C. Bremer III, eds., 1988) ("*Leg. Hist.*").][12]

See also id. (NRAB exempted from the Administrative Procedures Act, 5 U.S.C. §§ 500, *et seq.*); 29 C.F.R. § 301.1.

As this Court has repeatedly indicated, these exceedingly informal procedures are suitable to the purpose of determining the application of the labor agreements in the airline and railroad industries to particular factual situations. *See* cases cited at pp. 31, *infra*. Given the nature of the *fora*, however, it would be odd indeed if Congress had *mandated* that noncontractual, individual common law and statutory causes of action be tried before

[12] As noted previously, airline cases are heard not by the NRAB but by system boards of adjustment created by the parties to collective bargaining agreements. While such boards may have more formal procedures, the statutory intent argument must be evaluated with regard to the NRAB, since that is the adjudicatory body Congress had in mind in 1934 when it mandated use of the adjustment board procedure.

the NRAB and the other RLA adjustment boards.[13] As we now show, the statutory language, history and structure, as well as its administrative interpretation and its interpretation in this Court, all demonstrate that Congress has *not* done so.

B. Petitioners and their *amici* base their jurisdictional argument on the RLA's description of the minor dispute resolution mechanism as one that covers controversies "growing out of grievances *or* out of the interpretation or application of agreements." 45 U.S.C. § 153 First (i) (emphasis added). Pet. Br. 9-11.[14] The plain meaning of this phrase, it is insisted, requires that the term "grievances" must mean something other than a type of contractual dispute—indeed, must include *all* disputes that might arise in the workplace, including the dispute at issue here.

(i) Petitioners' argument that the plain meaning of "grievances" denotes extracontractual claims flies in the face of what has been the universal previous understanding of that term. This Court's RLA/NLRA decisions, in a variety of contexts, routinely use the term "grievance," and on every occasion of which we are aware, the word has been used to refer uniquely to disputes over the meaning or application of labor agreements. For example, in *Paperworkers v. Misco*, 484 U.S. 29 (1988), the Court observed that "[c]ollective-bargaining agreements com-

[13] *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991), and other cases concerning *voluntary* arbitration agreements do not detract from the conclusion that *mandatory* relinquishment of ordinary procedural protections for the determination of individual, governmentally-created rights is an intention not lightly ascribed to Congress.

[14] Petitioners also mention that § 152 First provides generally for a duty "to settle all disputes, whether arising out of the application of such agreements or otherwise." The obvious reference of the "or otherwise" in that provision, however, is to the obligation to negotiate concerning major disputes, which involve the formation or modification of other contracts rather than their application. *See* 45 U.S.C. § 152, Seventh; *Conrail*, 491 U.S. at 302-04.

monly provide grievance procedures to settle disputes between the union and employer with respect to the interpretation and application of the agreement and require binding arbitration for unsettled grievances." *Id.* at 36. Particularly, the Court has adopted this same understanding of "grievance" as the term is used in the RLA:

> The grievances for which redress is sought . . . are admittedly 'minor disputes' as that phrase is known in the parlance of the Railway Labor Act. *These are controversies over the meaning of an existing collective bargaining agreement in a particular fact situation, generally involving one employee.* [*Trainmen v. Chicago R. & I. R. Co.*, 353 U.S. 30, 33 (1957) (emphasis added.)]

If this were not enough, petitioners' argument about the "plain meaning" of the word "grievance" is wholly at odds with the way that word is used in its own collective bargaining agreement establishing the system board of adjustment to which petitioners would remit Norris' cause of action. For in that agreement it is specified that arbitration is available only for "grievances which may arise under the terms of this agreement." Pet. App. 51a. *See also* Pet. App. 54a (parties understanding that a system board so limited is in compliance with RLA); *id.* 55a ("The Board shall not have jurisdiction or power to add or subtract from this agreement").

(ii) Notwithstanding all of this, petitioners insist that to give full meaning to the disjunctive "or" in § 153 First, "grievance" must mean all employment-related disputes, including disputes based on the assertion of a statutory or common law right. This "plain meaning" argument is grounded on two assumptions, neither of which has merit either as a general matter, or in this particular case. The first assumption is based upon the canon of statutory construction that "the construction of a statute is preferred which gives to all words in it an operative meaning." *Early v. Doe*, 16 How. 610 (1853). Relying on that maxim, petitioners argue that the language on either side of the disjunctive "or" must

refer to different kinds of claims. But it is equally a maxim of statutory interpretation that a statute is to be read as a whole, since the meaning of all statutory language can only be understood in context. *See, e.g., King v. St. Vincent's Hospital*, 112 S.Ct. 570, 574 (1991). The assumption that Congress necessarily intended different words to connote wholly different concepts, without regard to the overall context in which the words appear, is not a sound one, and certainly is not one the Court has accepted when it has undertaken to interpret federal labor legislation. *See Pipefitters v. United States*, 407 U.S. 385, 421-22 (1972). *See also* Sutherland, *Statutory Construction*, § 46.05 ("courts should not rely too heavily upon characterizations such as 'disjunctive' or 'conjunctive' forms to resolve difficult issues, but should look to all parts of the statute").

The need to consider the context is especially relevant when considering the language of the RLA. As the Court has recognized:

> [T]he Railway Labor Act of 1926 came on the statute books through agreement between the railroads and the railroad unions on the need for such legislation. It is accurate to say that the railroads and the railroad unions between them worte the Railway Labor Act of 1926 and Congress formally enacted their agreement. [*Railway Employees' Dept. v. Hanson*, 351 U.S. 225, 240 (1956) (Frankfurter, J., concurring.)] [15]

This origin is significant in considering the pertinent language for two reasons: First, as a negotiated statute, the RLA is likely to be characterized by protective drafting, where one side insists on certain language simply to assure against a restrictive interpretation of other, arguably synonymous or broadly overlapping language. *Cf. Penn-*

---

[15] *See also* statements of participants in the drafting process in Hearings before the Committee on Interstate Commerce on S. 2306 (69th Cong. 1st Sess. 1926) 9-10 (Statement of A.P. Thom), *reprinted in* II Leg Hist.; *id.* at 21-22 (Statement of Donald Richberg).

sylvania RR v. Day, 360 U.S. 548, 550 (1959) ("The clash of economic forces which led to the passage of the [RLA, and] the history of its enactment . . . guide [its] judicial interpretation.").[16] Second, there can be no doubt that the drafters were familiar with the language of railroad industrial disputes, and would tend to use terms as understood within that industrial community, rather than a more generic sense. *See, e.g. McDermott International Inc. v. Wilander*, 111 S.Ct. 807, 810 (1991). Petitioners' "disjunctive 'or'" argument takes account of neither of these considerations.

Further, petitioners' reading of the statute is not in any way faithful to the maxim from which it is derived. If the term "grievance" is taken broadly to refer to all employment related disputes or complaints, then "grievance" would encompass contract-based disputes as well as others. The statutory language would then still be repetitious, this time with the phrase on the other side of the disjunctive being mere surplusage. On the other hand, to suggest that the term "grievance" does not at least *include* contract claims would fly in the face of the general understanding of the term, discussed above.

Even if petitioners' first assumption had merit, it in turn rests on the additional assumption that the phrase "disputes over the interpretation or application of agreements," was intended by its drafters to encompass the

[16] This kind of language is common in labor statutes even when the opposing parties do not themselves draft the language. *See Local No. 82, Furniture & Piano Mov. v. Crowley*, 467 U.S. 526, 541-42 & n.17 ("[M]uch federal labor legislation [is] . . ." the product of conflict and compromise between strongly held and opposed views, and its proper construction requires consideration of its wording against the background of its legislative history and in light of the general objectives Congress sought to achieve."). For example, the National Labor Relations Act, in forbidding secondary boycotts, forbids unions to "threaten, coerce, or restrain any person", where an object is "forcing or requiring" certain persons to do certain acts. § 8(b)(4), 29 U.S.C. § 158(b)(4). It is not immediately evident why "coerce" does not *include* "threaten" or "restrain" in normal parlance.

entire world of disputes arising out of norms established by the parties, such that the word "grievances," on the other side of the disjunctive, must have been intended to refer to something *other than* such disputes. But it is, at the least, just as likely that the drafters of this provision were concerned that the "interpretation and application" phrase would be construed *not* to include two important classes of disputes now recognized as contractual.

First, the drafters could well have been concerned that "disputes over the interpretation or application of agreements" would be understood to include only disputes over *express* terms of an agreement, and that the term "grievance" was needed to assure that after the RLA was enacted, employees could also bring to the adjustment boards claims based upon implicit understanding grounded in "the parties' 'practice, usage and custom.'" *Conrail*, 491 U.S. at 311, *quoting Transportation Union v. Union Pacific R. Co.*, 385 U.S. 157, 161 (1966). While it is now well understood that the labor agreement "is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate," *Transportation Union*, 385 U.S. at 160-61, *quoting Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-79 (1960), the drafters working in 1926, before the present expansive understanding of the reach of labor agreements was established, could well have taken pains to assure that § 153 First's language was not taken to state the commercial contract rule that the "agreement" is limited to the understandings that have been reduced to express written terms.[17]

The drafters might also equally have been concerned that "disputes over the application or interpretation of agreements" would be restrictively read to encompass only claims seeking prospective clarification of the meaning of a contract term, and not to include an individual's

[17] *See* Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1493-1500 (1959) (developing a theory of the differing treatment of implied contract terms in labor and commercial contracts).

(or group of individuals') retrospective claims that their contractual rights were violated in a specific instance. The latter is the sense of the term grievance that animates the Court's decision in *Chicago River*, 353 U.S. at 33. *See also Union Pacific R. Co. v. Price*, 360 U.S. 601, 613 (1959).

In sum, the likelihood is that the drafters used the terminology they did simply to assure against restrictive interpretations of one or another of the terms used, so as to make clear that *every* kind of dispute grounded in *workplace norms established by the parties*, is subject to the RLA minor dispute resolution procedures.

(iii) Petitioners also mention, as part of their jurisdictional argument, the fact that the 1936 airline amendments to the RLA provided for the transfer of some cases then pending before the National Labor Relations Board to the RLA grievance/arbitration procedure. Pet. Br. 12, citing RLA § 204, 45 U.S.C. § 184. But the 1936 amendments provide only that cases "growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted . . . before the National Labor Relations Board" should be transferred. In other words, *not* all cases pending before the NLRB, but only those meeting the otherwise applicable statutory minor dispute criteria, were to be transferred. While the NLRA provides statutory protections, independent of any contract, against discharges, there is no indication that Congress intended to transfer *those* cases to the RLA adjustment procedure.[18]

Indeed, Congress specifically recognized that airline cases pending before the NLRB on the effective date of the 1936 amendments would *not* as a general matter meet the statutory minor disputes criteria, and provided

[18] Certain cases arising under § 8(a)(5), involving unilateral changes by a carrier while a collective bargaining agreement is in place, meet the statutory minor dispute criteria. *See, e.g., NLRB v. C & C Plywood*, 885 U.S. 421 (1967).

otherwise for their disposition. Section 206 of the air carrier amendments provided that:

> All cases referred to the National Labor Relations Board, or over which the National Labor Relations Board shall have taken jurisdiction, involving *any dispute arising from any cause* between any common carrier by air . . . and employees of such carrier or carriers, and unsettled on the date of approval of this Act, shall be handled to conclusion by the *Mediation Board*. [Act of April 10, 1936, § 206, 49 Stat. 1191, emphasis added.][19]

In short, there is no basis in the language of the RLA for concluding that Congress intended to route extracontractual common law and statutory causes of action of any kind through the RLA adjustments boards.

C. The language of the statute aside, the "true significance" of the minor dispute resolution provisions of the RLA "must be drawn from [their] context as part of the [RLA] which itself draws its meaning from history." *IAM v. Central Airlines*, 372 U.S. 682 (1963). And the legislative history of the present Act, spanning four different statutes over a forty-year time period, uniformly confirms that Congress intended to confine the RLA "minor disputes" resolution system to controveries arising from or dependent on collective bargaining agreements.

(i) Although federal legislation concerning resolution of railway labor disputes had existed, in one form or

[19] It is hard to see how § 206, providing for the transfer of "any dispute arising from any cause" to the NMB, can be reconciled with the indication in § 204 that *some* disputes should be handled through the grievance/arbitration procedures for minor disputes. This redundancy not only confirms that the RLA generally is characterized by far from precise drafting but, additionally, suggests at least that the categories of NLRB cases expected to come within § 204 were quite limited.

We note as well that there were exactly two cases transferred from the NLRB and that both "were subsequently withdrawn by the petitioners without prejudice to their right to resubmit the cases in accordance with the RLA." *See Second Annual Report of the National Mediation Board* (1936) at 4.

another, since 1888, the "minor disputes" concept had its origin in the Howell-Barkley bill of 1924, supported by the unions but opposed by the railroads.[20] That bill provided for the adjudication of "any dispute arising only out of grievances or the application of agreements concerning rates of pay, rules, or working conditions" before mandatory, national adjustment boards. S. 2546, 68th Cong. 1st Sess. (1924), § 4; *see also id.*, §§ 1, 3, 5(B).

In explicating this language, the primary proponent at the Hearings of the statute, Donald Richberg, Counsel for the Organized Railway Employees—who in 1926 was also a key participant in the labor-management negotiations that resulted in the RLA as finally enacted (*see* p. 25, *infra*)—stated repeatedly and consistently that the term "grievance" is to be given its industrial relations meaning, connoting a dispute growing out of and concerning existing agreements. Mr. Richberg explained at the 1924 Senate Hearings:

> [C]ontroversies over [*collective bargaining*] *agreements* that threaten the interruption of service arise in two ways and an appropriate machinery is provided [in the bill] for settling peaceably each class of disputes. . . . Now, taking up the grievance disputes . . . *disputes over the application of existing agreements, commonly called "grievances."* [1924 Hearings at 17-18 (remarks by Donald Richberg, Counsel for the Organized Railway Employees) (emphasis added)].

See also id., at 27 (national adjustment boards will decide "grievances under the application of the agreement" which are "in a large number of instances of a petty character" and involve "[w]hat is good practice under this agreement and what is the fair application of it"); *id.* at 200 ("each and every provision . . . has been put into the bill solely for the purpose of preserving the rights

---

[20] The 1924 bill is particularly pertinent in construing the present Act as amended, because its provision for a national mandatory adjustment board was adopted in the 1934 amendments. 45 U.S.C. § 153.

of employees to honest representation in making agreements and honest enforcement of the terms of the agreements"); *id.* at 202 ("Now, coming to the question of adjustment of grievances when a dispute arises over the application of an agreement"); *id.* at 203.

(ii) With slight changes (principally, replacing "application of agreements" with "interpretation or application of agreements"), the language of the 1924 bill describing minor disputes was used again for similar purposes in sections 2, Fourth and 3, First of the 1926 version of the Railway Labor Act. I *Leg. Hist.* at 4-5. The references to the minor disputes provisions in the 1926 committee reports basically repeat the statutory language. H.R. Rep. No. 328, 69th Cong. 1st Sess.; I *Leg. Hist.* at 3; S. Rep. No. 606, 69th Cong. 1st Sess.; I *Leg. Hist.* at 100-01. But the comments made on the floor by proponents of the bill are more informative and make clear that the "grievances" covered by the statutory command ot arbitrate were *not any and all employee-employer disputes,* but only those growing out of the norms stated or otherwise incorporated in the labor agreements negotiated under the Act.

For example, Representative Barkley, a leading proponent of the bill and a member of the Committee that reported it, twice explained that, in railroad parlance, incorporated in the bill, a "grievance" is a variety of contractual dispute:

> There are two sorts of disputes that arise on railroads. One kind is a dispute growing out of the interpretation of agreements as to wage scales or working conditions that already exist. *These disputes might be termed grievances*; they might affect a large number of men in some way and they might affect only a small number of men, or they might affect a single individual. . . . [The adjustment boards established during government operation of the railroads, after which the RLA boards were modeled] were to settle *grievances of every kind and character growing out of disputes that arose over the interpretation of*

existing agreements as to scales of wages and conditions of service. [I Leg. Hist. at 192 (remarks of Rep. Barkley, 69th Cong., 1st Sess., Feb. 24, 1926) (emphasis added).]

As Representative Barkley later added:

> You see, there are two types of disputes recognized on railroads. One is the interpretation of agreements already in existence, applying to discipline and small grievances that may not only come up with reference to groups of men but may arise with reference to a single man. These are all technical. They have nothing to do with wages received, but they have to do with the technical interpretation of agreements that exist and the exercise of discipline between the management and employees. [*Id.*, at 205.]

The explanation offered on the Senate side by Senator Watson, the Chairman of the reporting committee, was similar. Beginning, as had Representative Barkley, with an historical survey covering the period of governmental operation of the railroads, Senator Watson stated:

> During that period many cases were referred to these boards of adjustment; but the boards of adjustment in that case, as in this bill provided, had to do only with *grievances—that is to say, with the interpretation and the application of existing agreements as to wages, hours of labor, and conditions of service* . . . The problems are all of a technical nature and therefore railroad men are required to decide them. So that . . . in the measure before us, *we provide for boards of adjustment to settle those technical questions that arise growing out of the interpretation and the application of existing agreements as to wages, hours of labor, and conditions of service* . . . . [*Leg. Hist.* at 480 (Remarks of Sen. Watson, 69th Cong., 1st Sess., May 6, 1926) (emphasis added).] [21]

[21] Without quoting the statements directly in point which we have reproduced in the text, petitioners rely primarily upon two other statements, also by Representative Barkley and Senator Watson, as demonstrating an intent to provide for mandatory arbitration of extracontractual disputes. *See* Pet. Br. at 15-16.

From these explanations, it appears that the language of the minor disputes provisions of the RLA was chosen to make absolutely clear that all varieties of contractual disputes—those arising from the complaints of individuals or groups of individuals, as well as those precipitated by union-management discussions or disputes, regarding the

---

Particularly when read in conjunction with the other, unambiguous remarks by the same individuals we have quoted, the statements quoted in petitioners' brief are entirely consistent with our position on the question. Thus, the entire paragraph by Senator Watson relied upon by petitioners reads:

> Let me say, Senators—and this is essential in the consideration of the question—that there are two classes of disputes that arise in connection with the operation of railroads. One class is what are ordinarily called grievances. They may be of a personal nature; they may involve a great many employees; they may involve a few employees; they may involve but one employee. *Of this class, also,* are disputes arising out of the interpretation and application of existing agreements as to wages, hours of labor, or working conditions. [I Leg. Hist. at 477 (remarks of Sen. Watson, 69th Cong., 1st Sess., May 6, 1926, (emphasis added).]

Since Senator Watson treated as part of the class "ordinarily called grievances" those disputes arising out of the interpretation and application of agreements, his statement *supports* our understanding that the term "grievances" does not exclude, as an entirely *different* class of disputes, contractual controversies.

Rep. Barkley's statement that adjustment boards will discuss "disagreements over grievances, interpretations, discipline, and other technicalities that arise from time to time in the workshop and out on the tracks" appears to be simply an indistinct summary of the same Representative's more precise remarks quoted in our text. That statement surely does not support petitioners' position, since it indicates that a "grievance" is *not* a "disagreement[] . . . over discipline."

Of the two other remarks petitioners present in support of their position (Pet. Br. at 9 n.8), the one by Rep. Arentz (referring to "grievances, discipline and disputes over the application and meaning of an agreement") for the same reason does not support the petitioners' position. And the statement by Rep. Crosser—that the adjustment board serves "to determine who is right and who is wrong, what is just and what is unjust"—is entirely too general and vague to throw any light at all upon whether those judgments are to be made with reference to an existing agreement or otherwise.

contract—were to be covered. There was no intent, however, to reach beyond contract-related matters.

This conclusion is decisively confirmed by the legislative history of the 1934 amendments to the Act. Those amendments entirely revised the minor disputes provisions of the Act, establishing a mandatory rather than voluntary adjustment board. 48 Stat. 1185, Pub. L. 73-442 (1934); *see I Leg. Hist.* at 820 (S. Rep. No. 1065, 73rd Cong., 2d Sess. (1934); *id.* at 918 (H.R. Rep. No. 1044, 73rd Cong., 2d Sess. (1934)). The jurisdiction of the new adjustment procedures was described with the same language used previously—"disputes . . . growing out of grievances or out of the interpretation and application of agreements." Section 3, First, (i), 45 U.S.C. § 153, First (i). This time the House Committee Report made it clear that the term "grievances" is not used to designate a group of disputes distinct from contractual disputes; rather, the new National Railroad Adjustment Board was described as having authority over

> minor disputes known as "grievances," which develop from the interpretation and/or application of the contracts between the labor unions and the carriers. [H. Rep. No. 1044, 73rd Cong. 2d Sess. (1934), *reprinted in* I *Leg. Hist.* at 919-920.]

Finally, the Congresses that amended the Act in other ways in later years also plainly acted on the understanding that the realm of adjustment board activity is limited to contractual disputes. For example, when, in 1936, the Act was amended to cover the newly developing airlines, the decision was made to delay establishing an adjustment board for the airlines. The explanation offered for the delay was as follows:

> This [National Air Transport Adjustment Board] will be created and will function in the same manner as the railway board, excepting that it need not be established immediately . . . The reason for this permissive delay in its formation is that *there is nothing for such a board to do until employment contracts have been completed*, and there are no such contracts in operation now. [I *Leg. Hist.* at 1050 (H.R. Rep. No. 2243, 74th Cong. 2d Sess. (1936) (emphasis supplied).]

And the 1966 Congress, which once again revised the minor dispute provisions, expressed repeatedly the understanding that those provisions applied to matters of contract interpretation. *See* H.R. Rep. No. 1114, 89th Cong., 1st Sess. (1965), I *Leg. Hist.* at 1309 (the minor disputes mechanisms apply to "grievances arising under collective bargaining agreements"); *id.* at 1352 (remarks of Representative Staggers, 89th Cong., 2d Sess., Feb. 9, 1966); *id.* at 1363 (remarks of Representative Thompson); *id.* at 1371 (remarks of Representative Horton).

(iii) We believe this history, fairly construed, supports the entirely commonsense understanding that "grievance" was intended to denote a particular kind of dispute based upon workplace norms developed by the parties themselves. The treatment of claims that the RLA *itself* has been violated lend further support to this view: The RLA assigns to the courts, not to the adjustment boards, the RLA *statutory* cause of action for retaliatory discharges, on the basis of union activity, indicating an understanding that such non-contractual causes of action are *not* "grievances." *See, e.g., Conrad v. Delta Air Lines, Inc.*, 494 F.2d 914 (7th Cir. 1974); *Adams v. Federal Express Co.*, 654 F.2d 452 (6th Cir. 1981). *See generaly Virginian Ry. Co. v. System Federation*, 300 U.S. 515, 545-553 (1937).

In contrast, petitioners' submissions to the contrary notwithstanding, there is nothing in the Federal Railway Safety Act ("FRSA"), 45 U.S.C. §§ 421-447, or its history indicating that Congress intended *all* retaliatory discharge cases to be adjudicated according to the RLA's minor dispute provision, even when based on extracontractual statutory or common law. The FRSA amendments of 1980 extended, to railroad employees only, protection against retaliatory discharge based on reporting statutory violations or refusal to work for safety reasons. Any claims arising under either provision were made

"subject to resolution" by the RLA adjustment board procedures. 45 U.S.C. § 441(c)(1).

Petitioners claim that Congress' decision to assign adjudication of this particular statutory retaliatory discharge causes of action to the RLA adjustment board processes demonstrates an intention that *all* noncontractual wrongful termination cases be decided through those processes. Even if the actions of a much-later Congress were in any way pertinent, the logical interference would be quite the opposite: If Congress thought that all such causes of action were already subject to the RLA adjustment board procedures, there would have been no reason to single out these particular causes of action for adjustment board coverage by explicitly so stating.

Moreover, the very section upon which petitioners rely for a contrary inference explicitly reserves to railroad employees the option of pursuing, outside of the RLA minor dispute procedures, claims based upon conduct violative of the FRSA *and* of another provision of law. Section § 441(d) provides:

> Whenever any employee of a railroad is afforded protection under this section and under any other provision of law in connection with the same allegedly unlawful act of an employer, if such employee seeks protection he must elect either to seek relief pursuant to this section or pursuant to such other provision of law.

If, as petitioners argue, Congress intended § 441 "simply to codify the existing system" under the RLA (Pet. Brief at 12), then the codification of an employee's right to an election of remedies in § 441(d) demonstrates that the pre-existing RLA system did *not* limit "whistleblowers" relying on a non-RLA "provision of law" exclusively to the RLA grievance/arbitration procedure.

D. The adjustment boards charged with administration of the minor disputes provisions of the RLA, and the National Railroad Adjustment Board ("NRAB"), particularly, have uniformly understood those provisions as pertaining only to disputes invoking contract-based rights.

Thus, the NRAB has repeatedly and, so far as we can ascertain, consistently rejected cases that were not based on labor agreements, or sought to adjudicate extra-contractual causes of action. *See, e.g.,* NRAB Fourth Div. Award No. 4548 (1987) ("The function of this Board is limited to deciding disputes in accordance with the provisions of a controlling Labor Agreement as applied to the facts and evidence in the record."); NRAB Third Div. Award No. 24348 (1983) ("The two issues raised by the Petitioner are not related to the interpretation or application of contracts and thus are outside our authority."); Third Div. Award No. 21926 (1978) ("An individual's . . . allegation that Agreements are illegal . . . without even a hint that the Agreement is not being properly applied, clearly constitutes a case over which the Board lacks jurisdiction.") NRAB Second Div. Award No. 6462 (1973) ("This Board is not empowered to interpret the laws of Congress."); NRAB Third Div. Award No. 20048 (1973) (The Board's jurisdiction is by statute limited to interpretation and applying the terms of in being collective bargaining agreements. . . . We do not have judicial power to find an action or course of conduct 'illegal'."); NRAB Third Div. Award No. 19790 (1973) ("this Board lacks jurisdiction to enforce rights created by State or Federal Statutes and is limited to questions arising out of interpretations and application of Railway Labor Agreement.").[22]

Airline system board cases reach the same conclusion. *See Northwest Airlines/Airline Pilots Association, Inter-*

[22] *See also, e.g.,* NRAB Second Div. Award No. 11768 (1994); Second Div. Award No. 11768 (1989); First Div. Award No. 23909 (1989); Fourth Div. Award No. 4674 (1989); Third Div. Award No. 27650 (1988); Fourth Div. Award No. 4500 (1986); Third Div. Award No. 25554 (1985); Second Div. Award No. 9405 (1983); Third Div. Award No. 24348 (1983); Third Div. Award No. 22707 (1980); Third Div. Award No. 22318 (1979); Second Div. Award No. 8131 (1979); Third Div. Award No. 20565 (1974); Third Div. Award No. 19950 (1973); Fourth Div. Award No. 2967 (1973); Third Div. Award No. 18352 (1970); Third Div. Award No. 18123 (1970); First Div. Award No. 21459 (1968).

national System Board of Adjustment, Decision of June 28, 1972, at 13; *United Airlines, Inc.*, 48 LA 727 (BNA) (1967) ("The jurisdiction of this system board does not extend to interpreting and applying the Civil Right Act.").[23]

As this Court has recognized, such "uniform administrative interpretation" by the NRAB is of particularly "great importance" under the RLA, "reflecting, as it does, the needs and fair expectations of the railroad [and airline] industr[ies] for which Congress has provided what might be termed a charter for its internal government." *Pennsylvania R.R. Co. v. Day*, 360 U.S. 548, 552 (1959).

E. The foregoing should be more than sufficient to establish that Congress did not intend to direct employment-related causes of action based upon legal principles external to the applicable collective bargaining agreement to the dispute adjustment procedure mandated by the RLA. Moreover this is a case in which any such intent would have to be established with unusual clarity, both because of the usual presumption against federal displacement of state law (*see* pp. 8-10, *supra*), and to avoid constitutional problems as well.

Petitioners' jurisdictional preemption argument—that Congress' intent was to require that even state common law, extracontractual causes of action be adjudicated before RLA adjustment boards—runs afoul of a principle of statutory interpretation even stronger than the presumption against federal preemption:

> [W]here an otherwise acceptable construction of a statute could raise serious constitutional problems, the Court will construe the statute to avoid such problems unless the construction is plainly contrary to the intent of Congress. [*DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (citing cases).]

In this instance, petitioners' jurisdictional preemption argument, if adopted, would raise serious Seventh Amendment (and possibly Article III) problems.[24] For petitioners would relegate to a nonjudicial federal forum, without a jury, state common law causes of action, such as this one, with no substantive connection to the RLA or to the collective bargaining relationship that the RLA was enacted to foster and regulate.

Seventh Amendment analysis requires first, the determination of whether or not a statutory cause of action is sufficiently "analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those heard by courts of equity or admiralty." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989); *see also Teamsters Local 391 v. Terry*, 110 S. Ct. 1339, 1345-47 (1990). This case, however, involves a common law tort, albeit one recently recognized, and the relief sought—compensatory and punitive

---

[23] The National Mediation Board as well has always considered the Adjustment Board's jurisdiction limited to contract-based claims. *See* National Mediation Board, *First Annual Report* (1935), at 5 (RLA contracts "establish property rights for the individual employees which are enforceable through adjudication by the National Railroad Adjustment Board." *See also Second Annual Report* (1936) at 3 (NRAB functions "to interpret agreements or to settle finally grievances of employees arising thereunder"); *Fourth Annual Report* (1938) (adjustment boards resolve "all disputes growing out of questions, claims, or grievances involving the terms of these labor agreements."); *Thirty-first Annual Report* (1965) ("in the application of . . . agreements to specific factual situations, disputes frequently arise as to the meaning and intent of the agreement. These are called minor disputes.").

[24] The Seventh Amendment provides that "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall not be denied." U.S. Const., amend. VII.

The Seventh Amendment concerns were not raised below as an aid to construing the RLA. Parties are not, however, confined here to the same arguments which were advanced in the court below upon a federal question there discussed. *Illinois v. Gates*, 462 U.S. 213, 219-220 (1983); *Yee v. Escondido*, 112 S. Ct. 1522, 1532 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.").

damages—is clearly legal rather than equitable in nature. *Granfinanciera,* 492 U.S. at 42. Thus, the only significant question as to the applicability of the Seventh Amendment is whether "Congress may assign . . . resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as a factfinder." *Id.* at 42.

As a general matter, this Court's cases do not permit assigning to a non-Article III, nonjury adjudicative body "[w]holly private tort, contract, and property cases." *Granfinanciera,* 492 U.S. at 51; *see also id.* at 51-52 (Congress "lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury."). For both Seventh Amendment and Article III purposes, the test of whether a cause of action as to which the Federal Government is not a party involves "public" rather than "wholly private" rights is

> whether "Congress, acting for a valid legislative purpose pursuant to its constitutional powers . . . [has] created a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." [*Granfinanciera,* 492 U.S. at 54, *quoting Thomas v. Union Carbide Agricultural Products,* 473 U.S. 568, 593-94 (1985).]

RLA collective-bargaining agreement-based causes of action meet the "public rights"/"closely integrated" test, since the statute as a whole is directed toward encouraging the formation and enforcement of those agreements. That is why, presumably, this Court rejected, *sub silentio,* Seventh Amendment arguments raised by the parties in at least one RLA minor dispute contract-based case. *See, e.g., Pennsylvania R.R. v. Day,* 360 U.S. at 560-562 (Black, J., dissenting). But it is all but impossible to see why causes of action such as the one here with *no* contractual grounding are in any way substantively connected to the regulatory scheme of the RLA. At the least, the contention that a cause of action such as Norris' is a purely "private right" for Seventh Amendment purposes is a substantial one, and petitioners' preemption argument, untenable to begin with, should be rejected for that reason as well.

F. Notwithstanding these compelling precedential, statutory, historical, administrative and constitutional considerations, petitioners and their *amici* insist that in *Elgin, Joliet & Eastern Railway Co. v. Burley,* 325 U.S. 711 (1945), *aff'd on rehearing,* 327 U.S. 661 (1946), this Court *has* determined that extracontractual claims brought by employees covered by the RLA arising out of their employment are subject to the exclusive jurisdiction of the RLA adjustment boards. In fact, *Burely* did not decide any issue pertinent to this case.

(i) Petitioners rely on the following language in *Burley* defining an RLA minor dispute as one that

> relates either to the meaning or proper application of a *particular provision* [of a collective agreement] with reference to a specific situation or to an omitted case. In the latter event, the claim is founded upon some incident of the employment relation or asserted one, independent of those covered by the collective agreement, *e.g.,* claims on account of personal injuries. [325 U.S. at 723 (emphasis added).]

For a myriad of reasons, that single sentence in *Burley* is much too thin a reed to support petitioners' jurisdictional preemption argument.

The *Burley* statement is *dicta* by a narrowly divided Court; the claims actually at issue in *Burley* were in fact *contract* claims.[25] And, the meaning of the *dicta* is far

---

[25] The issue *decided* in *Burley* was whether an individual employee can bring a contract-based discharge cause of action in court if the union has settled the very same contract contention on behalf of the same member within the RLA grievance-arbitration procedure. A closely divided Court ruled that a union has no authority to settle grievances unless the union can show "in some legally sufficient way [the individual employee] has authorized it to act in his behalf." 325 U.S. at 738.

As a result of the broad reach of the decision, the United States, the railroad, the union and many other *amici* successfully petitioned

from clear. The word "omitted" in the *Burley* passage is most logically read as a reference to a norm that the parties have created but have omitted from the labor agreement's *explicit* language while meaning to incorporate it within the agreement as an implicit term. Conversely, the term "omitted" does not suggest a norm imposed by the courts or the legislature, rather than by the parties to the labor agreement. *See Detroit & Toledo Shore Line R. Co. v. United Transportation Union*, 396 U.S. 142, 154-155 (1969) (emphasis added) ("It would be virtually impossible to include all working conditions in a collective-bargaining agreement. Where a condition is satisfactorily tolerable to both sides, it is often *omitted* from the agreement, and it has been suggested that this practice is more frequent in the railroad industry than in most others."); *see also Conrail*, 491 U.S. at 311, *quoting Transportation Union v. Union Pacific R. Co.*, 385 U.S. 157, 161 (1966). For all it appears, then, the Court

---

for rehearing. The Court was informed in the petitions that the majority opinion was based on a misunderstanding of the way in which industrial disputes are determined so fundamental as to have resulted in "the shutting down of the Adjustment Board," because the opinion's express authority requirement was almost never met. 327 U.S. at 668-669 (Frankfurter, J., dissenting).

On rehearing, the Court affirmed its decision in form, but in fact greatly narrowed its reach, holding that normal laws of agency do not apply, and that there is a presumption that employees are aware of the way their union is settling their claim. 327 U.S. at 665-666. *See also id.* at 668 (dissenting) ("the Court 'adheres' . . . to [its previous decision] by extracting from it almost all of its vitality . . . . [A union member's] prospects . . . are largely illusory because the Court now erects a series of hurdles which will be, and we assume were intended to be, almost impossible for an employee to clear.").

That *Burley* was reheard is pertinent here for two reasons: First, the *dicta* relied on here was *not* repeated in the rehearing opinion. Second, that opinion is an implicit recognition that the original opinion was based on some basic misconceptions concerning the world of railroad and airline industrial relations—including, we maintain, misconceptions concerning the nature of collective bargaining agreements and the reach of nonjudicial dispute resolution processes within that world.

was referring only to claims based on *implied* contract terms, and not, as petitioners would have it, to claims based on independent sources of law.

Further, while the section in *Burley* including the "omitted case" language has oft been quoted, it has *never* been *followed* by this Court to grant RLA adjustment boards jurisdiction over extracontractual public law causes of action. *See, e.g., Conrail*, 491 U.S. at 305. Instead the cases in which the broad *Burley dicta* is quoted are contract-based cases. At the same time, as recounted in Part I, *supra*, in every case in which the *dicta* might have been applicable, the Court has ruled that the RLA adjustment boards are *not* the forum in which to adjudicate state law minimum labor standards. Most tellingly in *Buell*, this Court necessarily rejected as outside the adjustment boards' jurisdiction the one *specific* example of an "omitted case" that *Burley* gave—suits for personal injury that do not rest on a contractual base.

Finally, *Burley* was based on the understanding that the grievance-arbitration procedures provided for in the RLA are optional, rather than exclusive, even for contract-based claims. Therefore, reading the *dicta* for all it is worth suggests only that the adjustment boards *also* have jurisdiction over some class of extracontractual claims, *not* that those claims must be brought exclusively before Adjustment Boards. As Professor Feller has explained,

> *Burley* . . . confirmed with emphasis the assumption in *Moore* [*v. Illinois Cent. R. Co.*, 312 U.S. 630 (1941),] that a collective agreement constituted a contract enforceable by individual employees without regard to the procedures of the Adjustment Board.[28]
> . . . .

---

[28] *Moore* held that "neither the original 1925 Act, nor the Act as amended in 1934, . . . provided for settling disputes based on legal compulsion". 312 U.S. at 635. *Moore* based this conclusion on the fact that 45 U.S.C. § 153, *First* (i), the section directing minor dis-

> [T]he Court held that in the absence of a showing that the employees had authorized the union to act for them . . . [the Adjustment Board's] result did not bind them. Neither the majority nor the dissenters even raised the question . . . whether the plaintiffs had any business in court at all . . . . [Rather] [b]oth sides assumed that . . . the claims themselves, assuming them to be unsettled, were adjudicable in the courts rather than before the Board. [Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Calif. L. Rev., 663, 680-81 (1971).]

Given the permissive system that *Moore* and *Burley* posited, the assumption that the RLA allowed—but did not require—arbitration of *all* employer-employee disputes would have had no impact upon the right of individual employees to pursue individual rights claims in court.

During that same period, however, the Court in a series of cases decisively moved away from the *Moore-Burley* voluntary arbitration doctrine where rights created by the collective bargaining agreement *are* at the core of the dispute. *See generally* Feller, *A General Theory of the Collective Bargaining Agreement, supra*, at 682-686; 692-700. In those cases, as the Court came to understand that the adjustment board's jurisdiction over minor disputes was *exclusive*, the Court has consistently recognized as well that those disputes over which the board has exclusive jurisdiction are fundamentally contractual. *See Order of Railway Conductors v. Pitney*, 326 U.S. 561, 565 (1946) (finding exclusive Board jurisdiction when "the dispute involved was contractual in nature"). *See also Slocum v. Delaware, L. & W.R. Co.*, 339 U.S. 239, 242 (1950) (characterizing the RLA dispute resolution mechanisms as covering "disputes concerning the making of agreements and . . . grievances *arising under existing agreements*") (emphasis supplied); *id.* at 243 (the board has jurisdiction over "employee disputes *growing out of*

---

putes to the NRAB, says that such disputes "may", not "shall" be so directed. *Id.*

the interpretation of existing agreements") (emphasis supplied).

When, in *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972), the Court finally overruled *Moore* and held that the RLA adjustment boards were the exclusive forum in which to challenge breaches of RLA labor agreements, the Court also made absolutely clear that the board's exclusive jurisdiction is limited to claims alleging breach of the labor agreement:

> [Petitioner's] claim against his employer [is] a dispute as to the interpretation of a collective bargaining agreement. His claim is *therefore* subject to the Act's requirement that it be submitted to the Board for adjustment."

406 U.S. at 324 (emphasis added); *see also* pp. 44-47, *infra*.[27]

---

[27] *See also Conrail*, 491 U.S. at 305 ("[t]he distinguishing feature of [a minor dispute] is that the dispute may be conclusively resolved by interpreting the existing [collective bargaining] agreement"); *Gunther v. San Diego & Arizona Eastern Ry.*, 382 U.S. 257, 261-62 (1965); *Union Pacific Ry. Co. v. Price*, 360 U.S. 601, 609 (1959) ("grievances arising from the application of collective bargaining agreements to particular situations"); *Pennsylvania RR Co. v. Day*, 360 U.S. at 551-53 ("Congress [entrusted] an expert administrative board with the interpretation of collective bargaining agreements"); *Brotherhood of RR Trainmen v. Chicago R. & I.R. Co.*, 353 U.S. at 38 (quoting legislative history indicating that the railroad unions agreed to support the RLA on the understanding that "in respect to these minor-grievance cases that grow out of the interpretation and/or application of the contracts already made . . . they can very well permit those disputes to be decided . . . . by an adjustment board"); *Brotherhood of RR Trainmen v. Howard*, 343 U.S. 768, 774 (1952) (permitting under the RLA itself a judicial remedy to enforce the right of black employees not to be discriminated against on the basis of race because "[t]he claims here cannot be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board").

III. THE LINGLE DECISION PROVIDES THE APPROPRIATE ANALOGY FOR THE RULE OF DECISION IN THIS CASE.

The remaining questions, then, are two: First, what standard does apply in determining whether a particular cause of action is sufficiently rooted in the collective bargaining agreement to be within the exclusive jurisdiction of the RLA adjustments boards? And second, is Norris' Hawaii common law retaliatory discharge claim within or without the jurisdiction of the RLA minor dispute resolution system under that standard?

A. This Court has, under the NLRA, decided a case virtually identical to this one with regard to the connection between the asserted cause of action and the applicable NLRA labor agreement. *Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399 (1988), like this case, involved an employee covered by a labor agreement who alleged she was discharged from her employment in violation of the state common law of wrongful discharge. In both cases, the employee's factual allegations, if true, might well have been sufficient to show a violation of the applicable agreement, which in both cases made arbitration the exclusive remedy for claimed breaches of the agreement. And, in both cases, the employee initially invoked the contractual grievance procedure, and thereafter filed a common law wrongful discharge suit in state court. The only relevant difference between the two cases is that Jonna Lingle was working in an industry covered by the NLRA, while Grant Norris was an airline employee subject to the RLA.

Petitioners maintain that distinction is of sufficient moment that, even if their broad argument sweeping all employment-related disputes into the RLA minor dispute resolution system is rejected (as it must be, for reasons already stated), *Lingle* and its NLRA predecessors are not pertinent analogies in determining the preemption question. In particular, petitioners suggest that, while *Lingle* would not preclude state law litigation where there is only factual parallelism between the state cause of action and a

breach of the labor agreement claim that could have been made, the RLA should preclude state law suits as to which a contract-based claim might provide an alternative remedy, albeit not the one the employee has chosen to pursue. As we now show, however, the RLA exclusive jurisdiction doctrine for contract-based claims parallels the NLRA cases and principles, and every consideration points toward a common preemption rule covering both statutes.

(i) Preemption under LMRA § 301, a 1947 amendment to the NLRA, functions to assure that issues of NLRA contract interpretation are resolved through one body of federal common law, and, in particular, that if the parties to an NLRA labor agreement choose to have contract disputes resolved through arbitration, they are assured the benefit of that bargain.[28] As the Court explained in *Allis-Chalmers v. Lueck*, 471 U.S. 202, 209 (1985), this preemption doctrine follows from *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), where "the Court ruled that § 301 expresses a federal policy that the substantive law to apply in § 301 cases 'is federal law, which the courts must fashion from the policy of our national labor laws.'" *Lueck*, 471 U.S. at 209, *quoting Lincoln Mills*, 353 U.S. at 456.

In *Teamsters v. Lucas Flour*, 369 U.S. 95 (1962), the Court resolved the "choice of law" question inherent in *Lincoln Mills*, by ruling that these federal common law principles must apply in all NLRA breach of labor contract cases, whether brought in state or in federal court. Thus, the Court declared federal contract law paramount, and state contract law preempted, when courts are presented with labor contract claims.

Finally, in a series of cases starting with *Lueck*, and including *Lingle*, the Court considered the extent to

---

[28] *See* Brief for the AFL-CIO As Amicus Curiae In Support of Petitioner in No. 92-1920, *Livadas v. Aubry*, pp. 4-25, for a more detailed argument of the development and purpose of LMRA § 301 preemption.

which § 301 preempts state law claims that are styled as something *other* than a breach of contract claim. Collectively, these cases establish that if the parties to a labor agreement bargain for arbitration of breach of contract claims, that bargain is to be respected regardless of the label that a plaintiff may attach to a claim that *in essence* alleges a breach of the labor agreement. *See, e.g., Lueck*, 471 U.S. at 211. Very simply stated, a state law claim that states in substance that the defendant-employer denied the plaintiff-employee covered by a collective bargaining agreement a *contract right* does nothing more than give force to the applicable labor agreement, and so is a contract claim preempted by § 301. *Id.*

On the other hand, the § 301 preemption law recognizes that if a plaintiff's claim is grounded upon a substantive state labor standards right, the claim is *not* preempted by § 301. This is true even though the plaintiff *could* have sought remedies for the same injury under the labor agreement. *Lingle*, 486 U.S. at 408-410. And it is true even though resolution of the state law claim may require tangential references to a labor agreement, most particularly when an employer asserts the agreement as a *defense* to the claim. *See, e.g., Caterpillar Inc. v. Williams*, 482 U.S. 386, 395 (1987) ("a plaintiff covered by a collective bargaining agreement is permitted to assert [in state court] legal rights *independent* of that agreement") (emphasis in original).

When such contract questions arise in the course of resolving an independent state law claim, § 301 requires that "federal law would govern the interpretation of the agreement, but the separate state-law analysis would not be thereby pre-empted." *Lingle*, 486 U.S. at 413 n.12. Any broader understanding of § 301 preemption, the Court has stressed repeatedly, would have the improper result of depriving unionized workers of the benefits of independent state worker protective laws, a consequence that cannot be squared with the limited role of § 301 preemption in the NLRA-LMRA scheme, or with the over-all purposes of federal labor legislation, which was

to improve the lot of workers, and not to deprive them of rights otherwise available to workers generally. *Metropolitan Life*, 471 U.S. at 754.

(ii) The RLA contract-based preemption doctrine from its inception has exactly parallelled in development and scope the LMRA doctrine. Thus the doctrine originated from this Court's decision in *IAM v. Central Airlines, supra*, where the Court determined that "the [RLA] § 204 contact, like the Labor Management Relations Act § 301 contract, is a federal contract and is therefore governed and enforceable by federal law, in the federal courts." 372 U.S. at 692. A federal law of RLA contract was necessary to insure that RLA contracts be subject to uniform interpretation:

> If these contracts are to serve this function under § 204, their validity, interpretation, and enforceability cannot be left to the laws of the many States . . . . The needs of the subject matter manifestly call for uniformity. Compare *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-104 (1962). [372 U.S. at 691-692.]

In identifying the source of the preemptive reach of the RLA arbitration provision, the *Central Airlines* Court did not, as petitioners would have it, look to policies or language unique to the RLA arbitration scheme, nor did the Court suggest that it was attempting to "keep employment disputes in the transportation industry out of the courts." Pet. Br. 41. Instead, *Central Airlines* explicitly adopted the doctrine previously developed under LMRA § 301. Indeed, as just noted, *Lucas Flour* is the decision that was to become the principal foundation for the § 301 preemption doctrine developed in *Lueck* and *Lingle*. And the very pages of *Lucas Flour* cited by the Court in *Central Airlines* were in turn excerpted at length in *Lueck* and again in *Lingle* to explain the principle of uniformity of contract interpretation that animated the Court's subsequent preemption holdings. *Lueck*, 471 U.S. at 210; *Lingle*, 486 U.S. at 404 & n. 3. *Central Airlines*, then, adopted for the RLA the *Lincoln Mills/Lucas Flour* understanding of the LMRA § 301.

(iii) *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972), built on the holding of *Central Airlines* in exactly the same manner that *Lueck* built on *Lucas Flour* in considering the preemptive effect of the RLA on claims that are not pleaded as breach of contract claims, but are nevertheless grounded on contract rights. Because we agree with petitioners that "*Andrews* goes quite far toward resolving the issues before the Court on the instant petition, (Pet. Br. at 28)—albeit the resolution *Andrews* supports is the opposite of the one which petitioners propound—we consider that decision in some detail.

As noted (pp. 38-39, *supra*), *Andrews* overruled *Moore* and held that the RLA adjustment boards are always the exclusive fora in which to challenge breaches of RLA labor agreements. The central issue between the parties in *Andrews* was not, however, whether *Moore* should still govern in all claims alleging breach of contract under the labor agreements. Both sides recognized that *Moore* had already been overruled in all but name. Rather, the question dividing the parties was whether *Andrews* was or was not a contract-based case.

Thus, the plaintiff employee in *Andrews* claimed that *his* case was not really a breach of labor contract case at all, and therefore adjudicable in the courts:

> This controversy does not involve a *"labor dispute"* as that term is commonly understood; it does not involve the interpretation of a collective bargaining agreement or concern the wages or rates of pay or vacation or retirement or pension or seniority rights or working conditions of any class or group of employees. [*Andrews*, Brief for Petitioner at 5 (emphasis in original)].

And the defendant employer in *Andrews* countered with the insistence that the Georgia wrongful discharge tort "is nothing more than a suit for breach of an employment contract (for absent the contract there are no rights at law of course)." *Andrews*, Brief for Respondent at 9. So understood, the employer further argued, the case provided the vehicle to overrule *Moore* in light of the NLRA decision in *Maddox*, "making the rights of workers in the railroad industry comparable to those of workers who have collective bargaining agreements within the sphere of the Labor Management Relations Act." *Id.*, 6, 9. *See also id.* at 32-33, 41-42, 51.

The *Andrews* Court understood that its decision turned on the proper characterization of the claim before it:

> [T]he very concept of "wrongful discharge" implies some sort of *statutory or contractual* standard that modifies the traditional common law rule that a contract of employment is terminable by either party at will. *Here it is conceded by all that the only source of petitioner's right not to be discharged, and therefore to treat an alleged discharge as "wrongful," is the collective bargaining agreement between the employer and the union. . . . The existence and extent of such an obligation in a case such as this will depend on the interpretation of the collective bargaininb agreement. Thus petitioner's claim, and respondent's disallowance of it, stem from differing interpretations of the collective-bargaining agreement.* . . . . His claim is *therefore* subject to the Act's requirement that it be submitted to the Board for adjustment. ·[406 U.S. at 323-24 (emphasis supplied).]

This conclusion triggered a vigorous dissent focussing not on the ruling that contract claims should be resolved exclusively through the NRAB, but on the majority's conclusion that Andrews' claim was a contract claim. *See* 406 U.S. at 327 (Douglas, J., dissenting) ("no issue involving the collective bargaining agreement is tendered"); *id.* at 331 ("This is a plain, ordinary, common-law suit not dependent on any term or provision of a collective-bargaining agreement").

In deciding the case, then, the *Andrews* Court adopted the employer's argument in *both* respects: that the same preemption rules should apply under the RLA as under LMRA § 301, and that applying those rules to the facts before it, Andrews' claim sounded in contract and had to

be resolved through the adjustment board. Accordingly, *Andrews* relied squarely upon the doctrine estabilshed under the NLRA/LMRA scheme:

> In *International Association of Machinists v. Central Airlines*, [*supra*], an agreement required under § 204 of the Railway Labor Act was said to be "like the Labor Management Relations Act § 301 contract . . . a federal contract and . . . therefore governed and enforceable by federal law, in federal courts." 372 U.S. at 692. A similar resolution was reached under § 301(a) of the Labor Management Relations Act in *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).
>
> In *Republic Steel v. Maddox*, 379 U.S. 650 (1965), the Court deduced from the Labor Management Relations Act a preference for the settlement of disputes in accordance with contractually agreed upon arbitration procedures. . . . Since the compulsory character of the administrative remedy provided by the Railway Labor Act for disputes such as that between petitioner and respondent stems . . . from the Act itself, the case for insisting on resort to those remedies is if anything stronger in cases arising under that Act than it is in cases arising under § 301 of the LMRA. [406 U.S. at 323.]

These are, of course, the same decisions that the Court relied upon in *Lueck*. In the *Andrews* Court's view, the argument for applying these same § 301 principles in the RLA context was "if anything even stronger" than in the LMRA context, because contract arbitration existed by operation of statute under the RLA. But nothing in the *Andrews* opinion suggests any basis for adopting *different* contract-preclusion principles under the RLA than under § 301.

To the contrary, in rejecting the employee's contention that he was seeking to assert a tort claim, and not a contract claim, *Andrews* adopted essentially the same "contract dependency" rule for RLA preemption that was later adopted, using remarkably similarly language, in *Lueck*, *Lingle*, and in their progeny for LMRA § 301

preemption: Only *because* the *Andrews* Court determined that the claim was in its essence a contract claim did the Court rule that the claim must be resolved through an adjustment board. *Compare Andrews*, 406 U.S. at 323-24, with *Lueck*, 471 U.S. at 211-217; *Lingle*, 486 U.S. at 405.

In sum, contrary to petitioners' belief, *Andrews* provides the strongest of support *for* the Hawaii Supreme Court decision here, which engaged in precisely the same analysis that the Court undertook in *Andrews*. Pet. App. 13a & n.10. *See also Puchert v. Agsalud*, 67 Haw. 25, 677 P.2d 449 (1984), *appeal dismissed for want of substantial federal question*, 472 U.S. 1001 (1985).

(iv) Petitioners nevertheless argue that a greater or different kind of uniformity is mandated by the RLA than required by LMRA § 301, because the RLA's arbitration scheme is mandatory, while "arbitration under the LMRA is a matter of contractual undertaking between the parties and is purely voluntary." Pet. Br. 40. But there is no reason why a scheme that mandates arbitration of contractual disputes and a scheme that encourages voluntary arbitration of such disputes require preemption of different *kinds* of claims. The purpose of the preemption in both cases is the same: to assure that when a claim *is* subject to arbitration, the courts will require that it be resolved in that manner. For that reason, presumably, *Andrews* applied a standard precisely parallel to *Lueck* and *Lingle* in determining whether or not the cause of action before it was contract-based, and therefore preempted.[29]

---

[29] Petitioners also argue that LMRA and RLA arbitration differ in that the former is solely a creation of the union and the employer, with the employee not even having a right of access to the arbitral forum, while the latter is by design better suited to adjudicate individual rights. Pet. Br. 41-42. But from the point of view of the individual asserting a statutory right, both systems suffer nearly identical deficiencies: Under both Acts the arbitration system is controlled by the union and the employer, and the employee has no input into crucial aspects of the process. Most of all, the individual

It is simply not possible to identify "a much broader [legislative] purpose in enacting the RLA" than that to be found in the NLRA *with regard to the role of contract-based claims in the arbitration system*. Pet. Br. 41. For, although there are important differences, the two statutes are fundamenally similar in that regard: Both provide a federal process for reaching agreements covering terms and conditions of employment, but do not seek to impose any substative terms on the parties to such agreements. And both provide a federal mechanism for resolving disputes over the application of those federal agreements. That being so, it is unsurprising that preemptive doctrines designed to protect both the collective bargaining and dispute resolution mechanisms of the two Acts have developed along parallel lines, and result in the same governing standards.

B. Petitioners argue alternatively that even if *Lingle* does provide the appropriate analogy for this case, respondent's claim nevertheless should still be preempted because in two respects that claim differs from that of the employee in *Lingle*. Specifically, petitioners argue that resolution of Norris' claim will require a court to interpret the labor agreement in order to determine whether he was indeed discharged, and whether his failure to sign off in connection with the work he performed justified the discipline meted out. Pet. Br. 43-44.

For reasons we have previously stated, petitioners' assertion that any claim that requires a court to make *some* reference to a labor agreement is preempted—either under *Lingle* or under the applicable RLA authority—is mistaken. *See Lingle*, 486 U.S. at 413, n.12; *McKinney*, 357 U.S. at 268, 270 (Veterans Act claims not preempted by the RLA "even though their determination may necessarily involve interpretation of a collective bargaining agreement," since "the actual character of the rights asserted" derive from a legal source other than the labor agreement).

---

has no say over the selection of the members of the arbitration board, who are typically management and union representatives, or of the neutral arbitrator if the board deadlocks. In this case, the System Board of Adjustment is created by agreement between the employer and the union, and the procedures adopted and the jurisdiction of the Board is a matter solely between the employer and the union. Labor Agreement, Art. XVI, Pet. App. 54a-58a. The union and the employer select the neutral arbitrator. *Id.* at 55a.

But even apart from this, petitioners are simply mistaken when they assert that resolution of respondent's claim will require interpretation of the labor agreement. As the Court held in *Lingle*, the question of whether an employee has been discharged is obviously a "purely factual question." 486 U.S. at 407. At trial, respondent no doubt will rely on a letter from the Company stating that he was "terminated as of this day, August 3, 1987, for insubordination," Jt. App. 214, and the Company apparently intends to argue that the termination was rescinded by a letter dated September 10, 1987. Jt. App. 100. The issue to be decided will be whether the company's actions —whatever they were and however it may seek to justify them—make out the element of discharge under Hawaii law. Whether or not these same facts constitute discharge under the labor agreement is simply not relevant to Norris' case.

By the same analysis, for purposes of this lawsuit it is irrelevant whether HAL would have been justified under the labor agreement in terminating Norris for failing to sign off on work he performed—an issue which to be sure would require interpretation of the labor agreement. The claim that Norris chose to bring—as opposed to the claim that petitioners wish to have resolved through arbitration—is that HAL was motivated to fire him because he took his complaint to the FAA. That allegation raises a purely factual issue of motive, and one that will be resolved without having to consider whether the discharge is as well violative of the contract. As the Court indicated in *Lingle*, the issue of whether the employer acted out of a lawful motive under state law is a "purely factual inquiry [that] does not turn on the meaning of any provision of a collective-bargaining agreement." 486 U.S. at 407.

We hasten to reiterate that it is not our position—or the rule as enunciated in the decided cases—that only in claims such as this one where there is *no* contractual issue present is there no preemption. But wherever the appropriate line should be drawn,[30] this case is the easy one, and petitioners' arguments that HAL had sufficient reason under the agreement to terminate Norris misunderstand the nature of the claim Norris has chosen to bring to state court.

CONCLUSION

For the reasons stated above, the judgment of the Hawaii Supreme Court should be affirmed.

Respectfully submitted,

Of Counsel:
MARSHA S. BERZON
177 Post Street, Suite 300
San Francisco, CA 94108

MARK SCHNEIDER
9000 Machinists Place
Upper Marlboro, MD 20772

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006

EDWARD DELAPPE BOYLE
SUSAN OKI MOLLWAY *
CADES, SCHUTTE, FLEMING & WRIGHT
1000 Bishop Street, 10th Floor
Honolulu, Hawaii 96813
(808) 521-9200
Counsel for Respondent

* Counsel of Record

---

[30] Petitioners thus assert that a claim should be preempted whenever the employer can raise as a defense an argument whose resolution requires interpretation of the labor agreement. Pt. Br. 44-45. We believe this assertion to be mistaken; indeed the Court already has rejected this argument in its decision in *Caterpillar*, 482 U.S. at 398-399. But even if petitioners accurately stated the law, it would be of no help to them here. HAL's only relevant defense is that it was *not* motivated by a desire to punish Norris for reporting the company's misconduct to the FAA. In the course of that argument, HAL may assert that it acted as it did because it believed its actions were authorized by the labor agreement. Whether HAL's interpretation of the labor agreement was in fact correct is irrelevant to determining HAL's true motive. For if HAL persuades a finder of fact that its true motive was a desire to enforce the labor agreement, Norris will lose his case, *regardless of whether or not HAL's interpretation of the agreement is sound.*